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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 In the Matter of:

5 LEHMAN BROTHERS HOLDINGS INC., CASE NO. 08-13555-scc

6 Debtor.

7 - - - - - x

8 LEHMAN BROTHERS HOLDINGS INC. ADVERSARY PROCEEDING

9 v. CASE NO. 15-01430-scc

10 ACTS RETIREMENT-LIFE COMMUNITIES, INC.

11 - - - - - x

12 LEHMAN BROTHERS HOLDING INC.,

13 in its capacity as ADVERSARY PROCEEDING

14 v. CASE NO. 15-01431-scc

15 DAIWA SECURITIES CAPITAL

16 MARKETS CO. LTD.

17 - - - - - x

18 LEHMAN BROTHERS HOLDINGS INC. ADVERSARY PROCEEDING

19 v CASE NO. 16-01002-scc

20 STANDARD PACIFIC MORTGAGE, INC.

21 - - - - - x

22 U.S. Bankruptcy Court

23 One Bowling Green

24 New York, New York

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1 HEARING Re: Doc #47589 Status Conference Relating to the  
2 Motion of Dr. Thomas Marsoner to Deem Proofs of Claim to be  
3 Timely

4

5 HEARING Re: Doc #52342 Notice of Status Report of the RMBS  
6 Trustees with Respect to Compliance with the Protocol and  
7 Motion to Extend the Overall Claim File Cut-Off Date for  
8 Certain Loans Under the Protocol Order

9

10 HEARING Re: Adversary proceeding: 15-01430-scc Lehman  
11 Brothers Holdings Inc. v ACTS Retirement-Life Communities,  
12 Inc., Pre-trial Conference

13

14 HEARING Re: Adversary proceeding 15-01431-scc Lehman  
15 Brothers Holdings Inc., in its capacity as V. Daiwa  
16 Securities Capital Markets Co. Ltd.; Pre-Trial Conference

17

18 HEARING Re: Adversary proceeding, 16-01002-scc Lehman  
19 Brothers Holdings Inc. v. Standard Pacific Mortgage, Inc.;  
20 Doc #19 Motion to Dismiss Adversary Proceeding filed by  
21 Philip Rogers Stein on behalf of Standard Pacific Mortgage,  
22 Inc.

23

24 HEARING Re: Adversary proceeding: 16-01002-scc Lehman  
25 Brothers Holdings Inc. v Standard Pacific Mortgage, Inc.;

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1       **Pre-Trial Conference**

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25       **Transcribed by: Sheila Orms and Lisa Beck**

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1 P R O C E E D I N G S

2 THE COURT: Good morning, please have a seat.

3 How is everyone.

4 UNIDENTIFIED: Good morning, Your Honor.

5 THE COURT: Good morning, Ms. Marcus, how are you?

6 MS. MARCUS: Well, thank you. Jacqueline Marcus,

7 Weil, Gotshal & Manges on behalf of Lehman Holdings Inc. and  
8 the debtors. Your Honor, we're here for the ninety-fourth  
9 omnibus hearing which is really hard to believe --

10 THE COURT: Do we do something special for the  
11 100th?

12 MS. MARCUS: I think we should.

13 THE COURT: I think we should.

14 MS. MARCUS: That'll be about I guess around  
15 September or something.

16 THE COURT: Okay.

17 MS. MARCUS: There's actually one matter on --

18 THE COURT: Maybe we can invite Judge Peck back.

19 MS. MARCUS: There's actually one matter on the  
20 omnibus calendar for today and there are various conferences  
21 with respect --

22 THE COURT: Yes.

23 MS. MARCUS: -- to the adversary proceedings, and  
24 I'd like to introduce my colleague, Denise Alvarez who will  
25 be handling the motion of Dr. Thomas Marsoner to deemed

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1 proofs of claim to be timely.

2 THE COURT: Thank you. Good morning.

3 MS. ALVAREZ: Good morning, Your Honor. My name  
4 is Denise Alvarez on behalf of Lehman Brothers.

5 On February 19th, 2015, the Court directed that  
6 the parties engage in discovery on the threshold issue, and  
7 Your Honor it, I'll just quote, "whether or not I can deem  
8 this to be a timely filed proof of claim and that turns on,  
9 I think both sides agree, as to whether or not Dr. Marsoner  
10 was a known creditor."

11 And since that time, Your Honor, the parties have  
12 engaged in substantial discovery. I believe that the  
13 parties are in agreement that discovery is complete, so we  
14 would respectfully request that we move forward and schedule  
15 an evidentiary hearing on the threshold issue.

16 THE COURT: Okay. So I assume that it goes  
17 without saying that there's not agreement on the issue.

18 MR. VAN TOL: Well --

19 THE COURT: Based on discovery.

20 MR. VAN TOL: Based on discovery. Good morning,  
21 Your Honor, Peter Van Tol for Dr. Thomas Marsoner from Hogan  
22 Lovells and I'm joined by Shane Johnson.

23 But the parties still do debate whether or not Dr.  
24 Marsoner is a known creditor, and we would like to schedule  
25 an evidentiary hearing.

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1 THE COURT: Okay.

2 MR. VAN TOL: I had a chance to confer with  
3 counsel in advance, and I think we're in accord that a  
4 hearing any time after the second half of May or in June --

5 THE COURT: Okay.

6 MR. VAN TOL: -- would suit the parties.

7 THE COURT: And how much time do you think you'll  
8 need?

9 MR. VAN TOL: For the evidentiary hearing, Your  
10 Honor?

11 THE COURT: Yes.

12 MR. VAN TOL: I think it would be -- I mean, if we  
13 start at 9 in the morning, I'd be surprised we're not  
14 finished by mid-day, by 1 o'clock.

15 THE COURT: Okay.

16 MS. ALVAREZ: We're likely to have one live  
17 witness, some video testimony --

18 THE COURT: Okay.

19 MS. ALVAREZ: -- deposition testimony.

20 We thought between both sides, it could take a day  
21 and a half.

22 MR. VAN TOL: Well, Your Honor, that's -- I don't  
23 necessarily disagree. I had assumed that any deposition  
24 testimony Your Honor would consider in chambers rather than  
25 court. We also have one witness, so if we have two live

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1       witnesses --

2                  THE COURT: Okay. All right.

3                  MR. VAN TOL: -- I think maybe a day at most.

4                  THE COURT: So we'll allocate you a day. Let's  
5 see, since I have you both here, let's see what we can come  
6 up with. I don't have my June calendar. Let me ask you  
7 this rather than hold everybody up, we'll confer in chambers  
8 and come up with a couple of proposed dates, and we'll e-  
9 mail all of you. And then I would appreciate if you would  
10 agree between yourselves on a standard pretrial order, so  
11 that we know in advance who the witnesses are, and also  
12 include the filing of any pretrial submissions with respect  
13 to evidentiary matters or anything else.

14                  MR. VAN TOL: Yes, Your Honor.

15                  THE COURT: And to the extent that you can agree,  
16 which I think it's highly likely that you will agree, you'll  
17 contact us.

18                  MR. VAN TOL: Yes, Your Honor.

19                  THE COURT: All right?

20                  MR. VAN TOL: On the pretrial submissions, we had  
21 anticipated just as in trial, simultaneous ones, not back  
22 and forth.

23                  THE COURT: Yes, simultaneous ones, witness list  
24 and we would need copies of any exhibits you plan to  
25 introduce, the outer limits of anything you plan to

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1 introduce, subject to what you actually decide to put in at  
2 the evidentiary hearing.

3 MR. VAN TOL: And would the Court like that 30  
4 days advance, would that be too --

5 THE COURT: Oh, no, no, no. Three or four days in  
6 advance is fine.

7 MR. VAN TOL: This is what happens appear in  
8 bankruptcy court, Your Honor.

9 THE COURT: Well, I see the look of alarm  
10 sometimes, but we move on a quick pace, quick time frame.

11 MR. VAN TOL: Understood. And I think otherwise  
12 that is it. We are finished with any new discovery. We  
13 have one overhanging issue from an older request, but I  
14 don't want to take up the Court's time --

15 THE COURT: Okay. All right.

16 MR. VAN TOL: -- but I think we can work it out --

17 THE COURT: Okay. If you can't, let us know and  
18 we can arrange a telephone call. The only other thing  
19 somewhat off topic that I would add, it's likely to be June  
20 and not May, given what I know I have on the calendar in  
21 May, and it strikes me that that is summer associate season,  
22 and that this would be a very nice opportunity for you to  
23 have your summer associates participate but not bill your  
24 clients for the matter.

25 MR. VAN TOL: We'll consider that a court order,

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1 Your Honor.

2 THE COURT: All right. Thank you very much.

3 All right. Next.

4 MS. MARCUS: Thank you, Your Honor. The next  
5 matter is the adversary proceeding, Lehman Brothers Holdings  
6 et al versus ACTS Retirement-Life Communities.

7 THE COURT: Yes.

8 MS. MARCUS: It's going to be handled by Paul  
9 Hastings.

10 THE COURT: Okay.

11 MS. MARCUS: Your Honor, since Weil isn't  
12 representing Lehman on any of the matters, may we be  
13 excused?

14 THE COURT: Yes, of course, thank you.

15 MR. VAN TOL: And may we be excused, Your Honor?

16 THE COURT: Yes, thank you, have a good day.

17 Good morning.

18 MR. BENNETT: Good morning, Your Honor.

19 THE COURT: Good morning.

20 MR. BENNETT: Good morning, Your Honor, Joshua  
21 Bennett from Paul Hastings on behalf of Lehman Brothers  
22 Holdings Inc. This is adversary proceeding 15-1430 against  
23 ACTS --

24 THE COURT: Right.

25 MR. BENNETT: -- Retirement-Life Communities.

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1 THE COURT: All right.

2 MR. BENNETT: This is another matter that's  
3 related to one of Lehman's former counterparties in interest  
4 rate swap transaction. Lehman's claim is in excess of \$5  
5 million in this one.

6 In this particular case, the counterparty opted  
7 not to terminate the interest rate swap upon the bankruptcy  
8 filings. Its position was it neither needs to terminate or  
9 need to comply with its obligations, doesn't need to pay  
10 that amount for about 90 months.

11 THE COURT: Okay.

12 MR. BENNETT: Judge Peck previously in 2009 we  
13 believe firmly ruled that was inappropriate in the case  
14 against a counterparty called Metavante --

15 THE COURT: Yes, Metavante.

16 MR. BENNETT: M-e-t-a-v-a-n-t-e. ACTS eventually  
17 decided to terminate in July of 2009. Under the terms of  
18 the contract it was obligated to do a market quotation  
19 process, it's position is that that process failed under the  
20 terms of the contract, it was then supposed to determine its  
21 lost or gain in good faith and reasonably, it was  
22 represented by a financial advisor who was the financial  
23 advisor in several of these matters that are before Your  
24 Honor.

25 That financial advisor instructed ACTS to take the

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1 position that by the sheer fact of the failure of the market  
2 quotation process, the swap was worthless, and therefore it  
3 neither -- it didn't lose anything.

4 THE COURT: Which financial advisor is that?

5 MR. BENNETT: This is KSR Capital Advisors, based  
6 in Chicago.

7 THE COURT: Okay.

8 MR. BENNETT: So the same issue is in a matter  
9 versus Longwood and versus Presbyterian Senior Care which  
10 were before Your Honor.

11 THE COURT: Okay.

12 MR. BENNETT: Lehman took the position that, no,  
13 the expected future payments under the swap clearly  
14 indisputably put Lehman in the money by about \$5 million  
15 based on net present value of what Lehman would pay versus  
16 net present value of what ACTS Retirement would pay.

17 ACTS has refused to pay anything. ACTS has  
18 refused to pay the nine months of missed payments, from the  
19 bankruptcy to the termination. Its position appears to be  
20 that there's some small amount unrelated to the interest  
21 rate swap that Lehman allegedly owes on a separate agreement  
22 that's separate from it, is a reserve fund agreement, S  
23 position that Lehman owes approximately 300,000. Lehman's  
24 claim is that it's owed in excess of 5 million.

25 The case is pretty straight forward. I've several

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1 had conversations with defense counsel. We have a proposed  
2 schedule that's worked out, assuming the dates are okay with  
3 you, we would file it when I get back to the office this  
4 afternoon.

5 THE COURT: Okay. Give me some sense of what your  
6 dates is.

7 MR. BENNETT: Fact discovery would end November  
8 17, that's seven plus months from now, expert discovery in  
9 January of 2017 and we would have dispositive motions before  
10 Your Honor February 2nd.

11 THE COURT: Why does it have to take so long? I --  
12 - perhaps it's more a question for ACTS counsel.

13 MR. BENNETT: Well, it wasn't scheduled on -- I  
14 had proposed -- I had based it on some others --

15 THE COURT: Okay.

16 MR. BENNETT: -- that you so ordered in similar  
17 matters, there were some holidays coming up.

18 THE COURT: Across the board I'm trying to  
19 accelerate the pace of these disputes. So to the extent  
20 that I go along, I'll consider them firm dates. And there's  
21 no automatic move to dispositive motions.

22 MR. BENNETT: Okay.

23 THE COURT: All right. So we're going to have to  
24 do a stop, look and listen after you complete fact and  
25 expert discovery, and I'll give you my view as to whether or

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1 not I think it'd be useful for there to be dispositive --

2 MR. BENNETT: Absolutely.

3 THE COURT: -- motions and if not, then I don't  
4 suppose I can preclude you from filing them, but I would  
5 prefer to move right to a trial.

6 MR. BENNETT: That would be fine. Because we  
7 think some of the issues are fairly straight forward --

8 THE COURT: Okay.

9 MR. BENNETT: -- and probably not --

10 THE COURT: What about ADR, has there been any  
11 attempt to mediate?

12 MR. BENNETT: There was. It went through the  
13 process, that obviously failed, which brings us here.

14 THE COURT: All right. Thank you. Good morning.

15 UNIDENTIFIED: Good morning, Your Honor. Rich  
16 Omishio (ph), Drinkel Bill and Reed (ph) on behalf of ACTS.  
17 I just wanted to say we obviously dispute the allegations of  
18 Lehman in connection with the adversary proceeding. We have  
19 --

20 THE COURT: Do you dispute the fact that you,  
21 prior to the termination of the agreement, that you made no  
22 payments?

23 UNIDENTIFIED: We --

24 THE COURT: Is that an undisputed fact?

25 UNIDENTIFIED: That we made no payments after the

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1 termination?

2 THE COURT: No, prior to the termination.

3 UNIDENTIFIED: Prior to the termination?

4 THE COURT: Yeah.

5 UNIDENTIFIED: I believe that is undisputed, I'd  
6 have to double-check. And, Your Honor, with regard to the  
7 schedule, we had understood that the schedule is the same as  
8 in terms of time periods as in the other cases are based on  
9 similar --

10 THE COURT: What's the total amount of payments  
11 that weren't paid prior to the termination, do you know?

12 MR. BENNETT: It's in excess of 200,000.

13 THE COURT: Do you want to go back to mediation?

14 UNIDENTIFIED: I'd have to raise it with my  
15 client, Your Honor, but the mediation was unsuccessful.

16 THE COURT: Well, I take it that ACTS is a non-  
17 profit.

18 UNIDENTIFIED: It is, Your Honor.

19 MR. BENNETT: Your Honor, we tried mediation,  
20 there were briefs, there was a mediator's recommendation, we  
21 reached out to the counterparty prior to --

22 THE COURT: Have you shared any of the documents  
23 that evidence the market -- the failure of market quotation  
24 process?

25 UNIDENTIFIED: We did not represent ACTS in

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1 connection with the mediation, we've been brought in for the  
2 litigation, Your Honor. But it's my understanding some  
3 documents were shared in mediation.

4 MR. BENNETT: That's correct.

5 THE COURT: All right. Well, I would suggest you  
6 get started on fact discovery and see what is revealed in  
7 the documents, particularly with respect to the failure of  
8 market quotation and take a good look at how the market  
9 moved during the relevant period of time, and to the extent  
10 that it looks like further mediation would be a good idea  
11 based on more information, you can let me know.

12 UNIDENTIFIED: Thank you, Your Honor.

13 THE COURT: All right?

14 MR. BENNETT: Thank you, Your Honor.

15 THE COURT: Okay. Thank you.

16 All right. The next matter on my agenda is Daiwa  
17 Securities.

18 How are you, Mr. Tambe?

19 MR. TAMBE: Fine, thank you, Your Honor. You?

20 THE COURT: I see Mr. Maloney (ph).

21 MR. MALONEY: Good morning, Your Honor.

22 THE COURT: Getting into position. Smiling today.

23 MR. MALONEY: We resolved the other matter.

24 THE COURT: What's that?

25 MR. MALONEY: We resolved the other matter.

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1 MR. TAMBE: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. TAMBE: Jayant Tambe and Lauri Sawyer and  
4 Jeremy Merdolin (ph) from Jones Day for Lehman. This is our  
5 first appearance on the Daiwa matter. It's an adversary  
6 complaint.

7 Just briefly, it's a single 1992 ISDA master  
8 agreement, 955 transactions, trades of various types,  
9 interest rates, CDS, foreign exchange. The early  
10 termination date designated by Daiwa was 9/26 so not  
11 immediately upon the bankruptcy filing of LBHI, a week or so  
12 later.

13 If you look at the mid-market valuations, on the  
14 mid-market valuations Lehman was in the money \$75 million on  
15 the early termination date which is 9/26. The claim, the  
16 proofs of claim that have been filed by Daiwa in the amount  
17 of \$22 million going the other way.

18 There is collateral involved as well, so it's not

19 --

20 THE COURT: Uh-huh.

21 MR. TAMBE: The spread isn't 75 million to 22.

22 The spread is about \$40 million in valuation difference  
23 between the mid-market values and the values that they have  
24 arrived at.

25 The complaint that was filed in March of this year

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1       alleged breach of contracts, alleged a breach of the implied  
2       covenant, bad faith and fair dealing, and also sought to  
3       expunge the proofs of claim.

4                  It was filed by Weil, we've been substituted in as  
5       counsel very recently. There's a motion to dismiss that has  
6       just been filed by Daiwa. We have talked about a schedule.  
7       We may need to tweak the schedule a little bit, because the  
8       way it works right now it's a little out of sync.

9                  THE COURT: Is that on the calendar for a May  
10       date?

11                 MS. SAWYER: It is on the calendar for a May date,  
12       but that -- we didn't what the June omnibus was, and that  
13       didn't give us really the time that we had agreed on --

14                 THE COURT: Okay.

15                 MS. SAWYER: -- briefing schedules. So we were  
16       looking for a new date for argument essentially.

17                 THE COURT: Okay. All right. So why don't we add  
18       that to the list of dates that we need to give you. Why  
19       don't you contact Mr. Beller in chambers with some proposed  
20       dates that are mutually acceptable to the parties, and we'll  
21       get you on the calendar. It doesn't have to be an omnibus  
22       day, all right.

23                 MR. TAMBE: We've also had a discussion, I think  
24       it was a somewhat extended discussion yesterday between  
25       counsel just to set up a schedule on some expectations.

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1 Fact discovery, we anticipate, will be completed by January  
2 2017.

3 THE COURT: Okay.

4 MR. TAMBE: Expert discovery by mid-summer 2017.

5 So late summer 2017, I'm ready, I'm waiting for it, late  
6 summer 2017 we anticipate would be an appropriate hearing  
7 date or trial date in this matter.

8 MS. SAWYER: Just to clarify, that's what we  
9 proposed yesterday, they're considering it, so we don't yet  
10 have an agreement.

11 THE COURT: Right now 2017 is shaping up to be  
12 back-to-back-to-back Lehman trials. So the earlier we can  
13 get you slotted in for something, the more likely it is to  
14 actually go then. So I would suggest to you though that  
15 late summer, literally late summer, meaning September I  
16 think is more palatable for folks than late August. I don't  
17 think anyone wants to be here in late August.

18 MR. TAMBE: So we'll confirm, propose a schedule  
19 probably in the next couple of days.

20 THE COURT: Okay. How long do you think you'll  
21 take for this one, Mr. Tambe, how long for the trial?

22 MR. TAMBE: Oh, I can't even begin to estimate  
23 that. I would say just given the number of trades and  
24 values, five days or less. So, you know, four to five days.

25 THE COURT: All right. Thank you.

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1 MR. ZUTSHI: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. ZUTSHI: Rishi Zutshi for Daiwa. We have been  
4 in mediation with the debtors since 2011, July 2011.

5 THE COURT: How's that going?

6 MR. ZUTSHI: Well, for several years we were told  
7 we couldn't even make any statements about what our position  
8 was with respect to --

9 THE COURT: I was -- that was a sardonic comment,  
10 yes.

11 MR. ZUTSHI: We have been -- we're happy to be  
12 before Your Honor now and are hopeful that we can address,  
13 you know, I think one of the main issues that has been a  
14 hindrance to our negotiations has been the legal theory that  
15 is the primary legal theory in the complaint which is  
16 essentially that Daiwa -- the operative agreement here was  
17 1992 ISDA master agreement in which the parties had selected  
18 loss and second method.

19 THE COURT: Okay.

20 MR. ZUTSHI: And the legal theory that  
21 (indiscernible) has taken thus far and it's evidenced in  
22 their amended complaint for the breach of contract claim is  
23 that Daiwa was not entitled to calculate loss based on  
24 market quotations that it solicited and obtained on the  
25 early termination date, unless it had actually entered into

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1 replacement transactions for those trades.

2 THE COURT: Okay.

3 MR. ZUTSHI: So that and -- and that is a nutshell  
4 the -- and subject to the motion to dismiss, the  
5 (indiscernible) last week. And we do think the resolution  
6 of that issue could be helpful both in, you know, narrowing  
7 issues if there were to be any sort of further trial, but  
8 also in terms of --

9 THE COURT: So is that a motion to dismiss or is  
10 that a motion for summary judgment?

11 MR. ZUTSHI: It's a motion to dismiss.

12 THE COURT: Okay.

13 MR. ZUTSHI: Based on the way the pleadings are  
14 currently framed. As I -- and essentially, the issue is the  
15 amended complaint the way it's currently standing on right  
16 now, states that quotations that Daiwa solicited our  
17 essentially hypothetical costs and so that difference of \$40  
18 million that Mr. Tambe just referred to is based on the bid  
19 offer, you know, adjustments to those mid-market values,  
20 which in Lehman's taking the position that Daiwa is not  
21 entitled at all unless (indiscernible) replacement  
22 transactions.

23 And so based purely on language of the loss  
24 definition which Your Honor is very familiar with --

25 THE COURT: I'm familiar with.

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1                   MR. ZUTSHI: -- and the last sentence of that  
2 definition and we think that that claim cannot stand on its  
3 face, that theory is legally invalid. And then there's also  
4 issues with their breach (indiscernible) claim and the  
5 objection obviously, you know, built upon the same theory  
6 that the other claims are.

7                   THE COURT: Okay. Very good. So we will -- we're  
8 going to leave this one with your contacting Mr. Beller for  
9 a date for the motion and then you'll get back to us about  
10 target dates for the trial. All right. Thank you very  
11 much. Thank you for coming in.

12                  All right. Next on my list is -- well, let me  
13 ask, is anyone here on the Divern (ph) adversary?

14                  UNIDENTIFIED: (indiscernible) we just found out  
15 about this last night after hours.

16                  THE COURT: I'm sorry, come up, yeah, who do you  
17 represent?

18                  UNIDENTIFIED: We're going to be representing  
19 North Star and Wilmington Trust. We have not filed any  
20 documents yet. We found out after hours last night.

21                  THE COURT: Hold on, hold on. This is in the  
22 Divern adversary?

23                  UNIDENTIFIED: Yes, number 16 on your --

24                  THE COURT: Yes. Is Mr. Divern here?

25                  UNIDENTIFIED: I believe it's (indiscernible).

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1 UNIDENTIFIED: No, I'm Thomas Hemel (ph), I'm  
2 counsel with Lehman Brothers Holdings.

3 THE COURT: Yes. I'm just trying to figure out  
4 what's going on because we were unable -- my understanding  
5 was that there was an attempt to adjourn this, but that no  
6 one could get in touch with Mr. Divern. Is that your  
7 understanding? So what shall we do today?

8 UNIDENTIFIED: Your Honor, we haven't been served.  
9 We became aware of this case because it flashed on one of  
10 our outside counsel's screens, and they let us know about  
11 it, and we thought that they would, absent any communication  
12 from the plaintiffs, put it off and see if we actually did  
13 get served.

14 UNIDENTIFIED: I believe that's the same situation  
15 with --

16 THE COURT: Yeah, I see.

17 UNIDENTIFIED: There's also a bankruptcy  
18 proceeding by Ms. Divern in Maryland as well.

19 THE COURT: It's a Ms. Divern, not a Mr. Divern?

20 UNIDENTIFIED: I believe it's a Miss, but I don't  
21 know.

22 UNIDENTIFIED: We're guessing, Your Honor.

23 THE COURT: I see.

24 UNIDENTIFIED: Information that was relayed to me  
25 it was a Miss.

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1 THE COURT: I see. All right. Well, the  
2 plaintiff is not here, so I can't do anything today. So  
3 I'll take it off the calendar. I'm going to adjourn it  
4 without date, and I'll just ask you folks to attempt to  
5 contact the plaintiff and let us know.

6 UNIDENTIFIED: Thank you, Your Honor.

7 UNIDENTIFIED: Thank you, Your Honor.

8 THE COURT: All right. Thank you for coming in, I  
9 appreciate it.

10 All right. So I think that takes us back to  
11 Standard Pacific.

12 Good morning.

13 MR. STEIN: Good morning, Your Honor, Philip Stein  
14 on behalf of Standard Pacific Mortgage.

15 Your Honor, as the Court is aware, we do believe  
16 that there are --

17 THE COURT: Well, before you get started, let me  
18 take an appearance.

19 MR. ROLLIN: Thank you, Your Honor, Michael Rollin  
20 and Maritz Braswell, Rollin Braswell Fisher --

21 THE COURT: Okay. So first of all we have a  
22 threshold issue over the filing, the late filing of a reply  
23 brief. So we need to talk about that first.

24 MR. STEIN: Okay. With respect to the timing,  
25 Your Honor, we apologize. We harken back to what the

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1 gentleman said earlier today about litigators in bankruptcy  
2 court. Having only been involved in this in connection with  
3 the ADR process, never having been involved in the larger  
4 bankruptcy case, I can honestly say I didn't even think to  
5 look at the, what now I understand is the 2010 second  
6 amended case management order that makes clear that these  
7 are to be filed by noon rather than 4:30 or 5:00 p.m. when  
8 we filed it. So my apologies on that, Your Honor.

9 I thought that we would be setting a case  
10 management order specific to the adversary proceeding, and  
11 that's what we would be bound by.

12 THE COURT: Mr. Rollin.

13 MR. ROLLIN: Your Honor, I -- you know, receiving  
14 the reply brief on 5 o'clock on a holiday weekend put the  
15 plan administrator to its task over the course of a weekend  
16 to prepare to address those issues.

17 I believe and really the only thing that's new in  
18 there is the collateral estoppel argument. Your Honor may  
19 want to hear about that separately, but --

20 THE COURT: Well, you know, there's a -- I mean,  
21 besides the late filing which also disadvantaged me because  
22 I had my packet of materials to review for the weekend and  
23 that wasn't included in them. It's not standard reply brief  
24 material, it's a wholly new argument.

25 So there's the timing issue, and then there's a

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1 fact that you raised an entirely new argument. So that's  
2 not a matter of something that is different in bankruptcy  
3 court versus non-bankruptcy court. That's just not the  
4 purpose of a reply brief.

5 So -- but the last thing I want to do is, you  
6 know, in a procedural way create any infirmities if you will  
7 in the record. So what I'm inclined to do and I'll ask Mr.  
8 Rollin if he's happy with this, because to the extent that  
9 there's an aggrieved party on this narrow issue, I would say  
10 it is he, I can deem the letter that you replied as a  
11 surreply and it can become the record of this case. Or, you  
12 know, and obviously you can address as much as you like on  
13 the record. I don't think that the additional issue is that  
14 complicated frankly.

15 MR. ROLLIN: Your Honor, we agree. We'd like to  
16 nip this collateral estoppel issue in the bud frankly. We  
17 would like -- you know, I'd like to frankly see how the  
18 argument goes today, whether any new material comes in. I  
19 believe it would be reasonable for the plan administrator to  
20 be able to put in a real surreply that addresses the  
21 arguments more fully, but I might wait and see how that goes  
22 today.

23 THE COURT: Okay. All right. So that can be our  
24 working plan because I think it's a secondary issue.

25 MR. ROLLIN: Thank you, Your Honor.

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1 THE COURT: So --

2 MR. STEIN: Your Honor, if I may --

3 THE COURT: Yeah.

4 MR. STEIN: Certainly we would have no objection  
5 to the plan administrator filing a --

6 THE COURT: Okay.

7 MR. STEIN: -- fuller surreply brief if it deems  
8 it necessary.

9 THE COURT: I mean, I think it's no secret that  
10 I'm very familiar with this issue. And I read the 10th  
11 Circuit opinion several times, I've read your briefs several  
12 times, and I've reread my decision several times. And we --  
13 there's still a ships passing in the night problem here, and  
14 I simply -- I don't think that the 10th Circuit addressed  
15 the issue, indeed the 10th Circuit opinion makes no mention  
16 whatsoever of Section 710 or Section 711.

17 And I, in a very, I thought and Judge Polly agreed  
18 with me, in a very, very, very detailed way methodically  
19 went through every decision prior to the 10th Circuit that  
20 dealt with this issue and gave my analysis of why some of  
21 them were more persuasive than others. Not an exercise that  
22 I particularly enjoyed, because of course, I have tremendous  
23 respect for every judge who had the delightful task of  
24 reading through the sellers guide.

25 But I did note something interesting, and that is

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1 that when I looked at the caption of the 10th Circuit case,  
2 it does not include an appeal of Judge Bremer's decision in  
3 -- that I discussed at length in my opinion.

4 MR. STEIN: That's correct, Your Honor. Let me  
5 update the Court on that if I may.

6 That is as Your Honor is aware, the one case that  
7 was decided against any of my clients in the District of  
8 Colorado on this issue. Even Judge Bremer agreed with the  
9 rest of his fellow jurists that there was an issue with  
10 regard to the application of the borrowing statute, and  
11 therefore, Delaware's three statute of limitations should  
12 apply, but it then did proceed to treat indemnification the  
13 way you ultimately did.

14 But where things stand with that, Your Honor,  
15 right now, is that knowing that we were going to file a  
16 motion for reconsideration in light of what the 10th Circuit  
17 had done, with the 10th Circuit obviously being binding on  
18 Judge Bremer, what Lehman has agreed with us to do, in lieu  
19 of our filing a motion for reconsideration is to jointly  
20 seek and we have filed this with Judge Bremer, a motion to  
21 vacate his opinion as a prelude to Lehman dismissing with  
22 prejudice that claim.

23 So Judge Bremer has not yet moved on that in the  
24 week or ten days since that has been filed. But, Your  
25 Honor, that one opinion from Colorado, which was an outlier

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1 to begin with, with respect to what all the judges had done  
2 with respect to these issues, is almost certainly going to  
3 no longer have any effect, either because it's going to be  
4 vacated or because of a motion for reconsideration.

5 But, Your Honor, one thing I would like to address  
6 with you, leaving aside issues that, you know, we feel very  
7 strongly about with respect to Section 711 being as the  
8 contract says on these four occasions a remedy,  
9 indemnification being remedy, and the fact that the  
10 indemnification and repurchase are dealt with in tandem and  
11 always --

12 THE COURT: It's a misreading of the Seller's  
13 Guide.

14 MR. STEIN: Your Honor --

15 THE COURT: It is a misreading of the Seller's  
16 Guide. And counsel in Hometrust admitted -- admitted in  
17 response to my question that under the theory that you are  
18 suggesting, there's no good time to bring a claim.

19 MR. STEIN: Your Honor, we take the exactly  
20 opposition position as we did in our papers. And I wanted  
21 to start there actually with regard to the substance of our  
22 argument.

23 Leaving aside the issue of what we see as clearly  
24 a remedial provision, and, in fact, at the Lehman and Aurora  
25 identified as a --

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1                   THE COURT: Characterizing it as a remedial  
2 provision doesn't advance the ball. It's remedial in the  
3 sense that it is intended to compensate for a loss. But the  
4 fact that it is listed in 710, that indemnification is  
5 listed in 710 and in 711, has significance.

6                   MR. STEIN: Your Honor, repurchase is listed in  
7 both 710 and 711. Events of default are listed in Section  
8 710. The first times that indemnification is referred to in  
9 Section 710, it's referred to with a specific citation to  
10 Section 711. Section 710 is not creating, in and of itself,  
11 a right to indemnification that doesn't otherwise exist in  
12 the contract. Section 710 is referring the reader to  
13 Section 711 which covers indemnification just as it's  
14 referring the reader at Section 705 which covers events of  
15 default in Section 701 which addresses the 48 different  
16 representations and warranties that are made, because,  
17 again, this is not an indemnification agreement in the  
18 broadest possible sense with respect to us effectively being  
19 guarantors or any loss. The reason there are 48  
20 representations and warranties is because the bridge must be  
21 tied to some underlying -- I mean -- I'm sorry. The right  
22 to indemnification is tied to, hinges upon, an underlying  
23 breach.

24                   But here is what I wanted to make clear. If you  
25 take Section 711 exactly as the Court does as creating an

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1 independent cause of action, then necessarily, it has to be  
2 dealt with and applied in accordance with its terms. One of  
3 the easiest things that Lehman could have done in  
4 establishing its Seller's Guide and establishing therein the  
5 right to indemnification would be to have said, in far fewer  
6 than the 425 or so words that comprise this provision as the  
7 (indiscernible) stands -- what they could have said but  
8 didn't was that this is a right that comes into being when a  
9 payment is made to a third party. And then, and only then,  
10 can this be pursued. One of our arguments, as you've seen  
11 in our briefs, is that if you take Section 11 (sic), again,  
12 exactly as the Court does, as something that must be applied  
13 according to its terms and it gives rise to an independent  
14 cause of action, there could be no question but that they  
15 didn't need to wait until they paid a third party to seek  
16 indemnification under that provision. Any loss, any damage,  
17 any attorneys' fees that they incurred. And by their own  
18 argument, by their own repeated allegations in this  
19 complaint and the omnibus complaint that they filed one week  
20 after the Tenth Circuit issued its ruling, what they say is  
21 that they were caused damages. The only time we did  
22 anything with regard to this case, which is when we sold the  
23 loans and made representations and warranties as of the sale  
24 date.

25 And so, it would stand all sorts of jurisprudence

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1 on its head to say that they didn't have a right, that they  
2 did not have a right, to seek compensation for not having  
3 gotten the value that they expected if indeed there were  
4 defects in these loans. It would stand all sorts of  
5 jurisprudence on its head to say that they --

6 THE COURT: I don't appreciate arguments that, in  
7 essence, tell me that I would be incredibly dense if I don't  
8 agree with you.

9 MR. STEIN: Your Honor, I'm certainly not taking  
10 that position.

11 THE COURT: You just told me that it would stand  
12 jurisprudence on its head.

13 MR. STEIN: No. But I'm raising the point that I  
14 don't believe was raised by other counsel in the Hometrust  
15 case. I'm asking the Court to consider that was not raised  
16 previously, which is that this is a very broadly worded  
17 provision. There's no question about it.

18 But having worded the provision as broadly as they  
19 did in drafting this contract, Your Honor, I'm simply saying  
20 that Lehman, having worded it that broadly, having created  
21 all sorts of opportunities for itself to seek  
22 indemnification under all sorts of different scenarios can't  
23 be heard to say now, well, we couldn't possibly have  
24 asserted an indemnification claim until there was an  
25 approved settlement in 2014.

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1                   So I'm certainly not trying to task Your Honor.  
2                   I'm simply asking that Lehman's own clear inclination, its  
3                   own clear motivation, in drafting Section 711 the way it did  
4                   must be applied. They can't be heard now to say, again,  
5                   having drafted this as broadly as they did at the outset of  
6                   the provision that there was no way they could seek  
7                   indemnification when they acquired the loan from us. There  
8                   was no way they could seek indemnification when they later,  
9                   as servicer, had to deal with foreclosure issues as indeed  
10                  they did on these loans. Or when they incurred any  
11                  attorneys' fees in connection with proofs of claim. They  
12                  never could have sought indemnification -- that's what  
13                  they're telling Your Honor -- until 2014. That's simply not  
14                  correct. And, Your Honor --

15                  THE COURT: There's nothing in the Tenth Circuit  
16                  opinion that has anything to do with this.

17                  MR. STEIN: Nope. Your Honor, I'm making an  
18                  argument that is not in the Tenth Circuit. I'm saying that  
19                  to the extent Your Honor is --

20                  THE COURT: So this is purely telling me to  
21                  reverse my other opinion. I just want to understand what  
22                  you're saying.

23                  MR. STEIN: I'm making -- we've made at least  
24                  three arguments. One is that this is a remedial provision.  
25                  The Tenth Circuit, you know, correctly said not only that

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1       they -- that Lehman has not pled indemnification as the  
2       (indiscernible) claim, but they couldn't. There are three  
3       pages of the 37-page opinion devoted to talking about cases  
4       like City of New York v. Lead Industries Association and the  
5       People's Republic of Yemen case. So it's not dicta, in our  
6       view, by any stretch of the imagination. They're doing what  
7       Courts very often do. It's just so you didn't plead this.  
8       And even if you had, I would rule against you because you,  
9       as the City of New York Lead Industries case says, you've  
10      distorted the true nature of an indemnification claim. So  
11      one argument is that.

12           A second argument is that to the extent that the  
13      Court wishes simply to apply 711 according to its terms, we  
14      would invite that, encourage that, and say there's no  
15      question but that you could have sought indemnification  
16      prior to a third party (indiscernible), indeed, their  
17      affiliate. Lehman Brothers Bank now known as Aurora only  
18      seeks repurchase and indemnification in the cases that it  
19      brings -- and it's brought many of them -- when there's been  
20      no third party involvement whatsoever.

21           THE COURT: Yes, because that's a different type  
22      of indemnification. That's a different type of  
23      indemnification. That's indemnification in 710. This is  
24      all very clearly explained in my opinion. You simply don't  
25      agree with my opinion. Judge Pauley agreed with my opinion.

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1                   MR. STEIN: No question about it. And I certainly  
2 recognize that his opinion counts far more than mine does in  
3 this regard. But my client does have a right to make the  
4 arguments that we're making.

5                   THE COURT: Of course they do.

6                   MR. STEIN: And so that's why I'm here, Your  
7 Honor, to assert that just as it prevailed on a motion to  
8 dismiss in the District of Colorado and then again on  
9 appeal, we believe that we should be entitled to prevail in  
10 this instance as well for many of the same reasons and the  
11 additional reason that I brought to Your Honor's attention.

12                  I would also just emphasize in that latter regard,  
13 in terms of just applying Section 711 according to its  
14 terms, that at the start of the provision, it is, as I've  
15 said, very broadly worded to encompass not just anyone as to  
16 third parties but any sort of loss, any sort of damages, any  
17 sort of cost or expense. It then becomes much narrower with  
18 respect to the set of circumstances in which losses and  
19 damages and penalties and everything come into play. That  
20 is to say it filters down to the fact that there has to have  
21 been some breach of a representation, warranty or covenant  
22 or act or failure to act on the part of the seller of the  
23 loans, in this instance, Standard Pacific Mortgage.

24                  THE COURT: That's right. And then there's a  
25 repurchased amount and it's complied with. There's no

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1 damage.

2 MR. STEIN: But there has to have been some  
3 underlying basis --

4 THE COURT: That's correct.

5 MR. STEIN: Right. And that being the case, as  
6 cases in Delaware, for example, the (indiscernible)  
7 basically cited the Aircraft Services case that we cited,  
8 have said in these instances, what has to be looked at when  
9 it's not just indemnification for any type of loss but  
10 indemnification tied specifically to some sort of breach,  
11 you do have to look to when the alleged breach occurred.

12 And so, our argument simply is that clearly what  
13 they're saying the breach is, is the only thing we did,  
14 which is to sell the loans and they say sell loans that were  
15 defective and thereby breached representations and  
16 warranties and we did that in 2006 and 2007. And so,  
17 therefore, under those Delaware cases, applying contractual  
18 indemnification provisions, not implied indemnification  
19 provisions to the extent there's a significant difference  
20 there, even there you have to look, for this type of  
21 contractual indemnification provision, at the time of the  
22 underlying breach. And so, we say that it should be time-  
23 barred in that respect as well.

24 MR. ROLLIN: Thank you, Your Honor.

25 I will be brief. I don't think there's any need

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1 to go into any great detail but I do want to emphasize what  
2 the Court pointed out and that is that nothing has changed  
3 in this case since Your Honor entered the rulings in LHM and  
4 Hometrust and since Judge Pauley issued his opinion with  
5 respect to those cases.

6 THE COURT: What about the argument that -- and  
7 what I'm referring to -- give me a moment. Counsel  
8 disagreed with my description of the position or the answer  
9 given by Hometrust counsel in the prior case that had Lehman  
10 asserted an indemnification claim before it paid out to a  
11 third party or promptly after the mortgages were booked,  
12 they would have been subject to dismissal as too early. And  
13 then the bookend of that, of course, is now the argument  
14 that it's too late. But counsel disagrees with that.  
15 Counsel is saying that you could have come in -- Lehman  
16 could have come in and asserted an indemmm -- and I'm putting  
17 "indemnification" in quotes because I think indemnification  
18 and remedy are not useful terms given the way that they're  
19 used in the Seller's Guide. So what about that argument  
20 that you had an indemnification claim earlier; you just  
21 chose not to assert it?

22 MR. ROLLIN: Your Honor, let's be very careful, as  
23 Your Honor has been, about distinguishing between  
24 "indemnification" in Section 710 and the indemnification --

25 THE COURT: That's right.

1 MR. ROLLIN: -- in Section 711.

2 THE COURT: Right.

3 MR. ROLLIN: Section 710 refers to  
4 indemnification. It's a very specific type of  
5 indemnification and it applies only in a very narrow  
6 circumstance. In Section 710, if there's a breach of a  
7 representation, warranty or covenant, solely with respect to  
8 those that are found in 702 and 703 of the Seller's Guide,  
9 that materially and adversely affects the value of the loan  
10 and the interest of the purchaser therein which are the  
11 requirements for repurchase in 710. But if the loan does  
12 not exist for repurchase, then and only then does "710  
13 indemnification" spring. That is solely to deal with the  
14 instance where you've satisfied the obligations of 710 and  
15 there is no loan to repurchase.

16 Section 711, as we brief, is entirely different.  
17 And it says, if the plan administrator, LBHI, is entitled to  
18 indemnification for its liability, losses, claims, judgments  
19 including from third parties which their theory reads out of  
20 the contract, all of that out of the contract, for --  
21 resulting from or relating to, in any way, any breach. And  
22 not only if representations, warranties and covenants but  
23 any representation, warranty, covenant or obligation  
24 anywhere in the Seller's Guide, anywhere in the loan  
25 purchase agreement or any act or any failure to act.

1                   So that's an entirely different provision. It has  
2                   a much broader causation standard. It has a different  
3                   damages calculation. It has a different set of factual  
4                   predicates that applies to a different, a broader set of  
5                   representations, warranties and obligations and springs from  
6                   precisely those types of third party claims that are at  
7                   issue here. You sell the loans upstream. That's the  
8                   transactional reality because those were all assignable and  
9                   they were assigned; they were sold upstream. A claim comes  
10                  back. A judgment is entered. A penalty is imposed. A fine  
11                  is levied, whatever that is. And a claim for contractual  
12                  indemnification under 711 then springs.

13                  THE COURT: Do you want to say anything about the  
14                  collateral estoppel argument?

15                  MR. ROLLIN: I --

16                  THE COURT: Because there is an undercurrent,  
17                  particularly in the reply, that there's gamesmanship going  
18                  on here in the sense that Colorado used to be the form of  
19                  choice and now all of a sudden this is the form of choice.

20                  MR. ROLLIN: Truthfully, Your Honor -- and --

21                  THE COURT: Truthful is good.

22                  MR. ROLLIN: I know. We're on a motion to dismiss  
23                  so this is also the -- truthfully was this is sort of  
24                  outside of all that but here's the background. The claims  
25                  in what were often called round 1, which were 710 claims,

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1       were generally filed in the state in which the counterparty  
2       resided so as to avoid the cost and delay with motions  
3       related to personal jurisdiction and venue.

4                   There came a point in time when, because so much  
5       of the work for Lehman is centralized in Colorado, that it  
6       made sense also, frankly, from a cost-saving perspective to  
7       have the litigation in Colorado. When the what are called  
8       now the round 2 claims, the claims with respect to the  
9       Fannie Mae and Freddie Mac claims against the estate, that  
10      was very centered in this court and those settlements were  
11      approved in this court. And it made sense for us to  
12      centralize those matters before Your Honor.

13                  So there's no gamesmanship. We've actually tried  
14      to be efficient is what cost conscious in the matter in  
15      which LBHI has prosecuted its claims first in round 1 under  
16      710 and now in round 2 under Section 711. That's all.

17                  I don't think you can talk about the collateral  
18      estoppel without first talking about, first, the clear  
19      distinction between 710 and 711 that we've been talking  
20      about. And the fact that the Tenth Circuit looked at claim  
21      -- breach of contract claims under 710 and applied the  
22      breach of contract statute of limitations --

23                  THE COURT: Right. All good.

24                  MR. ROLLIN: Okay. All fine.

25                  THE COURT: Right.

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1 MR. ROLLIN: That is not this case. So that part  
2 of the opinion is simply off point.

3 The other part of the opinion is this.

4 THE COURT: I think where there's a realm of  
5 disagreement is that in Mr. Stein's view, there's a moment  
6 of breach. There's a moment of breach and that everything  
7 starts to run from that moment of breach no matter what you  
8 call it. I mean, that's what this is all about. And that  
9 third party indemnification rights -- I'm putting words in  
10 Mr. Stein's mouth -- flow from that moment. And that's not  
11 what -- that's not the way I read 710 and 711 to work. It's  
12 not the way basic New York law works with respect to the  
13 accrual of a cause of action for third party  
14 indemnification. But I think that's the basic disagreement,  
15 if you will, that cuts across all these cases. But that  
16 when I queried Hometrust counsel about it -- and this is in  
17 footnote 4 of the opinion and I'll just read it. It says:  
18 "At oral argument, Hometrust's counsel confirmed that, under  
19 its interpretation of the Agreement, a party that  
20 subsequently sold the Loans and assigned its rights under  
21 the Agreement to a third-party (i) would be barred from  
22 making a claim against Hometrust for indemnification before  
23 the statute of limitations had run unless such party had  
24 actually made a payment to the third party, and (ii) could  
25 not assert a claim against Hometrust for indemnification if

1 payment to the third party was made after the statute of  
2 limitations had run."

3 So counsel for Hometrust confirmed a either too  
4 early or too late scenario which I think Mr. Stein disagrees  
5 with. He disagrees with the notion that there could have  
6 been -- that you couldn't have acted sooner.

7 MR. ROLLIN: Certainly not with respect to a third  
8 party claim that is specifically protected against by 711.  
9 It is any loss or liability, et cetera, resulting from and  
10 then a variety of things that only come into being when a  
11 third party makes a claim: judgments, penalties, fines,  
12 losses, et cetera.

13 How on the date of origination -- and there's no  
14 explanation for this -- how on the date of origination could  
15 LBHI have become liable to a third party for a judgment or  
16 anything else? It's simply a misreading, an impossible  
17 reading. And it's not fleeting, as Your Honor said in your  
18 opinion; it is illusory, as Your Honor said in your opinion,  
19 to take the position that a breach, a right to payment,  
20 accrues on the date of the sale when it is impossible that a  
21 third party claim of the character protected against in 711  
22 has even come into being.

23 THE COURT: All right. Is there anything more you  
24 want to say on the collateral estoppel point?

25 MR. ROLLIN: I do, Your Honor. And I want to

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1 mention these implied indemnity cases because I think it  
2 goes to this.

3 But since --

4 THE COURT: But we're not -- I mean, on that one,  
5 this case is not about implied indemnity.

6 MR. ROLLIN: Right. Right.

7 THE COURT: So it's --

8 MR. ROLLIN: That's all there is to it. And so,  
9 the argument that this is collateral -- collaterally estops  
10 a claim under Section 711 --

11 THE COURT: 11, right.

12 MR. ROLLIN: -- on an opinion that deals with  
13 Section 710 and accrual law with respect to (a), et cetera,  
14 right, or a body of implied indemnity cases that have  
15 nothing to do with this case is crazy. I don't know how  
16 else to say it. This issue --

17 THE COURT: It's not persuasive. How about that?

18 MR. ROLLIN: Not -- thank you, Your Honor. This  
19 issue was not litigated in the Tenth Circuit or any of the  
20 other cases that were cited. In fact, Your Honor looked at  
21 the underlying cases and found --

22 THE COURT: It did.

23 MR. ROLLIN: -- that they were not persuasive on  
24 this. They're certainly not dispositive on this and that  
25 this issue had not been addressed. And so, there is no

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1 collateral estoppel effect. Nor was, particularly with  
2 respect to the implied indemnity, necessarily adjudicated in  
3 the terms of a collateral estoppel because the opinion  
4 rested entirely on the fact that LBHI only pleaded a breach  
5 of contract claim not an indemnification claim. And once  
6 the Tenth Circuit reached its conclusion with respect to  
7 accrual for breach of contract claims, any further  
8 discussion of implied indemnity, relevant or not, and we  
9 think not, was not necessary to the decision for purposes of  
10 collateral estoppel.

11 THE COURT: All right. Thank you.

12 MR. ROLLIN: Thank you, Your Honor.

13 THE COURT: Mr. Stein, you know, it's  
14 interesting -- well, at least it's interesting to me. I  
15 read the Tenth Circuit opinion shortly after it came out  
16 'cause it flashed across my screen and it seemed relevant.  
17 And I looked at it before your motion came in and concluded  
18 that it -- from my perspective, it didn't change my  
19 conclusion.

20 I fully appreciate that we have a disagreement.  
21 And I also fully appreciate that -- how can I say this? I  
22 try not to phrase things in terms of wrong or right because  
23 judges are just people. So it may be down the road that  
24 another judge reverses my decision. But at the moment, at  
25 least, I seem to have, at some level, persuaded Judge Pauley

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1 who I think is pretty smart. And I did approach this with  
2 an open mind to see if I could persuade myself that based on  
3 what was said in the Tenth Circuit's opinion or in your  
4 papers, you know, I would take a different path. I just  
5 couldn't get there. As I was reading your papers, I had an  
6 answer, so to speak, for your arguments and it went back to  
7 my reasoning.

8 So I just want you to understand that despite the  
9 hard time that I'm obviously giving you, I did really engage  
10 in an open-minded exercise to give your arguments the  
11 attention that they deserved.

12 MR. STEIN: I appreciate that, Your Honor, very  
13 much. And I want to make clear if it's not obvious already,  
14 as I hope it would be, that, clearly, in taking the  
15 positions that we're taking recognizing that there are, in  
16 some instances, 180 degrees from the one you took  
17 previously, we're certainly not trying to cast aspersions on  
18 the intelligence of Your Honor which your reputation  
19 certainly precedes you and Judge Pauley as well.

20 But it is a legitimate debate. And no one should  
21 come away from this --

22 THE COURT: If there weren't legitimate debates, I  
23 suppose we wouldn't need the Supreme Court, right? There is  
24 circus --

25 MR. STEIN: True. And --

1 THE COURT: -- splits in all kinds of things.

2 MR. STEIN: And I guess, you know, the final point  
3 I would make and what's obviously a futile cause to make is  
4 that, you know, not only did the Tenth Circuit do what it  
5 did, but to the extent there is some concern on counsel's  
6 part that, well, that never happens when there are  
7 contractual indemnification cases, contractual  
8 indemnification provisions at issue, you know, the Tenth  
9 Circuit cited to any number of cases that did involve  
10 contractual indemnification. And we at least are very much  
11 persuaded by, among other things, the case we cited at page  
12 15 of our motion to dismiss, the CertainTeed Corp. v.  
13 Celotex Corp. from the Delaware Court of Chancery. And we  
14 believe Delaware law has to be factored in here for reasons  
15 that Judge (indiscernible) with. And in that case -- and it  
16 really goes to a point Your Honor made today -- that  
17 indemnification isn't really that helpful a term because, in  
18 that instance, what the Court said was that there was a  
19 Section 8 of that contract that was labeled  
20 "Indemnification" just like Section 711 is here. And what  
21 the Court said in the Delaware Court of Chancery was that  
22 here it's really a term of art. It really -- it's  
23 essentially just compensatory damages. And those  
24 compensatory damages have to be tied to an underlying  
25 breach. So that's where that Delaware court came out. I

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1 mentioned the Aircraft Services and LaPointe cases as well.

2 There are a number of cases that we've cited  
3 continuously that do involve contractual indemnification  
4 provisions and it's simply, as I said earlier, it's just a  
5 matter of a legitimate debate back and forth. People have  
6 different readings and different views as to how all this  
7 should be applied. And we -- again, I do appreciate Your  
8 Honor taking the time to consider all this anew.

9 THE COURT: Well, I think that I don't see any  
10 material differences on which I might distinguish the issue  
11 that you've brought in the motion to dismiss. So for the  
12 sake of facilitating the preservation of your appeal rights,  
13 I'm going to deny the motion for the reasons set forth on  
14 the record here and also in the memorandum decision that I  
15 previously issued in the Hometrust case. So to the extent  
16 that your appellate rights need to be preserved as they  
17 should be, then that would form the basis of an opinion. I,  
18 frankly, don't have the time to write another opinion on  
19 this issue.

20 MR. STEIN: Fair enough. Thank you, Your Honor.  
21 And I will just again note for the record for those purposes  
22 that we weren't involved in the Hometrust case and we do  
23 strongly disagree with some of the arguments and positions  
24 taken by Hometrust counsel.

25 THE COURT: Fair enough. Fair enough. All right.

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1 MR. STEIN: Thank you, Your Honor.

2 THE COURT: All right. Thank you so much. Thank  
3 you.

4 All right. What's next? Mr. Cosenza?

5 (Pause)

6 THE COURT: Good morning.

7 MR. COSENZA: Good morning, Your Honor. Todd  
8 Cosenza, Willkie, Farr & Gallagher, for Lehman Brothers  
9 Holding.

10 Your Honor, I guess there's just our status report  
11 on the protocol.

12 THE COURT: Right.

13 MR. COSENZA: And there also was a motion that was  
14 filed last week that the plan administrator worked closely  
15 with the trustees. We do not oppose.

16 THE COURT: Okay.

17 MR. COSENZA: I just want to sort of outline that.  
18 If there are any factual inaccuracies, I'm sure the --

19 THE COURT: Okay.

20 MR. COSENZA: -- trustees will correct me.

21 THE COURT: All right. I did have a chance to  
22 read the status report so thank you for that.

23 MR. COSENZA: Sure. So just a high level, Your  
24 Honor. As you know, there was a bar date of March 31st for  
25 all the loans to go through -- loan process to go through

1 the last step (indiscernible) of the protocol. The trustees  
2 have indicated to us that they've been diligent and they're  
3 asserting a number of loan files despite their diligence  
4 that they have not been able to get through at the protocol  
5 by March 31st. We worked closely with them to swiftly  
6 delineate those files, those loan files, and they're  
7 attached as Exhibit A to the motion. I think there are  
8 somewhere approximately 10,500 loans that are roughly  
9 attached and they fall into different buckets. I will  
10 (indiscernible) the Court with the buckets as to reasons why  
11 they slipped.

12 So we've agreed to give a two-month extension for  
13 those delineated loan files. So hopefully, those will be  
14 put through the protocol by May 31st.

15 What's important for the plan administrator is  
16 that we now have for the loans that have not gotten this  
17 extension, both sides have agreed that March 31st will act  
18 as a bar date. Any loans that had not been put through the  
19 protocol by that date are, in essence, expunged or  
20 disallowed. And I think we've -- both sides have worked and  
21 put in a proposed order to that effect granting the  
22 extension as well as will name the claims that have not  
23 been -- the loans that have not been put through. So  
24 basically, I think --

25 THE COURT: But they're pretty close to the total

1 number --

2 MR. COSENZA: Yes.

3 THE COURT: -- right?

4 MR. COSENZA: Yes. But I do think just as one  
5 point of clarification the transfer of loans have, in  
6 essence, as we've discussed several times -- those will fall  
7 to the side and, just for administrative purposes, that will  
8 help us going forward. And then we'll have to go through  
9 the remaining steps of the protocol as we discussed with  
10 Your Honor.

11 So on those basis, Your Honor, based on what's in  
12 the proposed language of the proposed order regarding these  
13 claims and the two-month extension, Lehman does not oppose  
14 the motion to extend out the protocol.

15 THE COURT: Okay.

16 MR. COSENZA: We look forward to moving forward.  
17 I don't know if you have any questions, Your Honor.

18 THE COURT: I just had a question. In paragraph 5  
19 of the report, it kind of outlines that -- what I would call  
20 the hit rate. Can you characterize what's the difference  
21 between the rejected claim files and the files deemed to  
22 have insufficient documentation?

23 MR. COSENZA: The rejected claim files would be  
24 files that we don't believe based on our past are not valid  
25 claims. There are some others that fall into this other

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1 bucket where we don't think there's been enough evidence  
2 provided to us to make an evaluation as to whether or not  
3 there's been a breach or a rep or warranty. Obviously,  
4 going through the remaining steps of the protocol does mean  
5 -- a lot of work done to compromise on both sides to try to  
6 get through this because there's been a number of files that  
7 have gone over or crossed to us that we don't think are  
8 really valid claims. We'll have to sort of listen to one  
9 another and see as to whether or not we can work through  
10 this.

11 I think this is -- you know, we had our hearing in  
12 December on this on the protocol. We anticipated largely a  
13 lot of this but we did not expect the volume of claims to go  
14 past that bar and to be sent over to the plan administrator.  
15 With that being said, you know, we have the remaining steps  
16 of the protocol and we're going to try to work through them.

17 THE COURT: Okay. All right. Thank you.

18 MR. COSENZA: Thank you, Your Honor.

19 THE COURT: Good morning.

20 MR. TOP: Good morning, Your Honor.

21 THE COURT: How are you?

22 MR. TOP: Frank Top from Chapman & Cutler on  
23 behalf of U.S. Bank. And again, you know, you have our  
24 status report.

25 THE COURT: Yes.

1 MR. TOP: And obviously, we've made a lot of  
2 progress from when we were here last December 2014.

Again, the sole purpose of the motion to extend was really with respect to two buckets of loans, one that were -- we anticipate getting from -- that we originally requested that we anticipate getting in very, very shortly to put through the protocol. And another is we believe may be covered loans and so we have a different time ask with those loans. We just need to finish up with dealing with those as well. And that's really the sole purpose that -- besides, you know, extending the time, we're not seeking any other changes to the protocol order or anything like that.

13 THE COURT: Okay. All right.

14 MR. TOP: Thank you, Your Honor.

15 THE COURT: Sounds good. Thank you.

16 Anything else? Okay. Anyone here for any other  
17 matter? All right. Thank you very much.

18 (Whereupon, these proceedings were concluded at 11:03 a.m.)

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IDENTIFICATION

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1 CERTIFICATES

2 We, Sheila G. Orms and Lisa Beck, certify that the foregoing  
3 is a true and accurate transcript from the official  
4 electronic sound recording.

5 **Sheila Orms**   
6

Digitally signed by Sheila Orms  
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7 **SHEILA ORMS, APPROVED TRANSCRIBER**

8 **Lisa Beck**   
9

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10 **LISA BECK (CET\*\*D-486)**

11 **AAERT Certified Electronic Transcriber**

12

13 **DATED: March 30, 2016**

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